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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,855

BRUCE A. GAINES,

Respondent.

_____/

JURISDICTIONAL BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
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COUNSEL FOR PETITIONER

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JURISDICTIONAL STATEMENT

Article V, section 3(b)(3) of the Florida Constitution states, in pertinent part, the following:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

STATEMENT OF THE CASE AND FACTS

This case involves an interpretation of the habitual offender statute with respect to the trial court's duty, if any, to make a factual finding on an affirmative defense never raised nor supported with evidence. The respondent, Bruce Gaines, was convicted of grand theft and sentenced as an habitual offender. The prosecutor provided the court with certified copies of seven prior felony convictions. The trial court found that Gaines had committed prior felonies, but it did not expressly find that the felonies were committed within the requisite time period, or that the judgments of conviction had not been set aside, or that the defendant had never been pardoned for the prior offenses. The First District Court of Appeal reversed the sentence because of the absence of these findings.

SUMMARY OF ARGUMENT

The decision of the First District Court of Appeal in the instant case directly and expressly conflicts with a decision of the Second District Court of Appeal on the same question of law. The Second District held that the trial court had no duty to make findings on unraised affirmative defenses (executive pardon and invalidation of judgment). The First District held to the contrary.

ARGUMENT

ISSUE

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN BONNER V. STATE, 599 SO.2D 599 (FLA. 2D DCA 1992) ON THE SAME QUESTION OF LAW.

In Eutsey v. State, 383 So.2d 219, 226 (Fla. 1980), this Court held:

> We also reject [the defendant's] contention that the State failed to prove that he had not been pardoned of the previous offense or that it had not been set aside in a post-conviction proceeding since these are affirmative defenses available to Eutsey rather than matters required to be proved by the State.

Id., at 226. In Bonner v. State, 599 So.2d 768 (Fla. 2d DCA 1992), the Second District held that the trial court had no duty to make findings of fact on these affirmative defenses until they were raised and supported with evidence. In the instant case, without citing Eutsey or Bonner, the First District held that the trial court must make the statutory findings.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument. This issue has been thoroughly briefed in two cases currently pending for review in this court, Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991), review pending, Case No. 79,535 and Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), review pending, Case No. 79,728, and the State has just filed its merits brief in a third case, Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA October 14, 1992), review pending, Case No. 80,751. The outcome in those cases will control the outcome here.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

1-8

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by U.S. Mail to John R. Dixon, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida, 32301 this 14th day of December, 1992.

Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,855

BRUCE A. GAINES,

Respondent.

_____/

APPENDIX

4-111778-TRR

F

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BRUCE A. GAINES,)

Appellant,)

v.)

STATE OF FLORIDA,)

Appellee.)

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 91-2904

Opinion filed October 23, 1992.

An Appeal from the Circuit Court for Alachua County. Stan R. Morris, Judge.

Nancy A. Daniels, Public Defender, and John R. Dixon, Asst. Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and James W. Rogers, Sr. Asst. Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Bruce A. Gaines has appealed from sentencing as an habitual felony offender, following his conviction of grand theft. We reverse, and remand for resentencing.

At the sentencing hearing following Gaines' conviction, the state presented certified copies of seven prior felony convictions. The trial court orally found that Gaines had prior

felony convictions, section 775.084(1)(a)1., Florida Statutes, but did not find that the current felony was committed within five years of the date of conviction of the last prior felony, that Gaines had not been pardoned for any qualifying offense, nor that none of the qualifying offenses had been set aside in a post-conviction proceeding. §§ 775.084(1)(a)2.-4., Fla. Stat. The court then found Gaines qualified as an habitual felony offender, and sentenced him as such.

The habitual offender statute requires that the findings enumerated in section 775.084(1)(a) be made by a preponderance of the evidence before the enhanced penalties afforded by that statute may be applied. § 775.084(3)(d), Fla. Stat. The Supreme Court has found a legislative intent that the findings be made with specificity. Walker v. State, 462 So.2d 452, 454 (Fla. 1985). A review of the record shows that the trial court made no findings, specific or otherwise, on three of the four enumerated factors. Therefore, the habitual offender sentence imposed herein must be reversed, and the case remanded for resentencing. See Knickerbocker v. State, 17 F.L.W. D1976 (Fla. 1st DCA August 21, 1992); Rome v. State, 17 F.L.W. D2061 (Fla. 1st DCA September 2, 1992); Barfield v. State, 17 F.L.W. D2246 (Fla. 1st DCA September 25, 1992).

Reversed and remanded for resentencing.

JOANOS, C.J., ERVIN and ALLEN, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

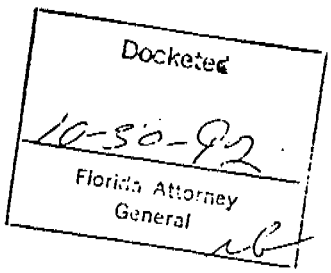
BRUCE A. GAINES,

Appellant,

vs. CASE NO. 91-2904

STATE OF FLORIDA,

Appellee.
_____/



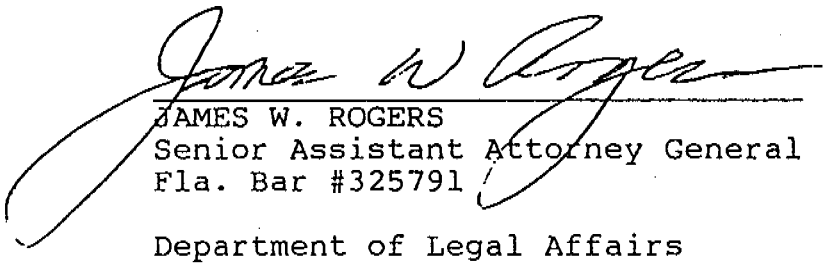
MOTION FOR CERTIFICATION

This is another of the seventy or so cases controlled by this Court's recent decisions in Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992), Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992) and Jones v. State, No. 91-2961 (Fla. 1st DCA 1992) (en banc), all of which certify the issue to the Florida Supreme Court and also conflict with Baxter v. State, 599 So.2d 721 (Fla. 2d DCA 1992) and Bonner v. State, 599 So.2d 768 (Fla. 2d DCA 1992).

Request certification of direct and express conflict with Baxter and Bonner and the certified question from Anderson, Hodges, and Jones.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
Senior Assistant Attorney General
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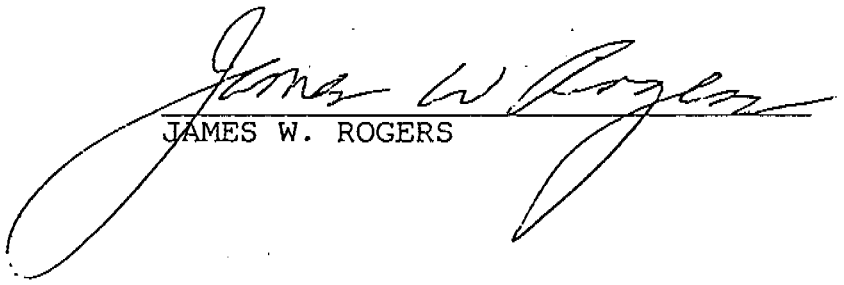
The Capitol
Tallahassee, Florida 32399-1050
904/488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John R. Dixon, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 28th day of October, 1992.



JAMES W. ROGERS

Rogers AAG

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

November 5, 1992

CASE NO: 91-02904

91-111778-TCR 7

L.T. CASE NO. 91-188-CFA

Bruce A. Gaines v. State of Florida

Appellant(s), Appellee(s).

Docketed
11-23-92
Florida Attorney General

BY ORDER OF THE COURT:

Motion for certification, filed October 28, 1992, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

By: Sandra Joyner
Deputy Clerk

DISTRICT COURT OF APPEAL 1ST DISTRICT STATE OF FLORIDA

Copies:

P. Douglas Brinkmeyer
James W. Rogers
John R. Dixon

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sold or served are stricken, as they do not reasonably relate to the crimes for which Wright was convicted. *See Daniels v. State*, 583 So.2d 423 (Fla. 2d DCA 1991); *Rodriquez v. State*, 378 So.2d 7 (Fla. 2d DCA 1979).

Appellant's convictions are affirmed, but the sentence is reversed and the case is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded.

SCHOONOVER, C.J. and LEHAN, J., concur.

Willie BONNER, Appellant,

v.

STATE of Florida, Appellee.

No. 91-01453.

District Court of Appeal of Florida, Second District.

June 5, 1992.

Defendant was convicted in the Circuit Court, Hillsborough County, Barbara Fleischer, J., of various drug offenses. Defendant appealed. The District Court of Appeal held that claims that there was no evidence presented and no findings as to whether defendant had been pardoned for any of prior felonies used in habitual offender sentencing or whether any of prior felony convictions had been set aside in postconviction proceedings were affirmative defenses which had to be raised by defendant at trial court level.

Affirmed.

Criminal Law ⇐1203.27

Claims that there was no evidence presented and no findings as to whether defendant had been pardoned for any of prior felonies used during habitual offender sentencing or whether any of prior felony convictions had been set aside in post-conviction proceedings were affirmative defenses which had to be raised by defendant at trial court level. West's F.S.A. § 775.084(1)(a)3, 4.

James Marion Moorman, Public Defender, and Cynthia J. Dodge, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Carol M. Dittmar, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Appellant raises two points in this appeal from judgments and sentences for various drug offenses. As to the first point, we find the evidence sufficient to support the convictions.

Appellant's second point is that the trial court sentenced him as a habitual offender without making the necessary findings. We note that, at the sentencing hearing, the trial judge had appellant's PSI before him and recited more than sufficient prior felony convictions, one of which was specifically noted by the assistant state attorney to be within five years of the instant conviction. When the trial judge asked if anybody had "any quarrel" with the PSI, defense counsel responded that he did not.

It is true that there was no evidence presented, and no findings, as to whether appellant had been pardoned for any of the prior felonies or whether any of the prior felony convictions had been set aside in post-conviction proceedings. See section 775.084(1)(a)3–4, Fla.Stat. (1991). However, those two matters are affirmative defenses which must be raised by appellant at the trial court level. *See Baxter v. State*, 599 So.2d 721 (Fla. 2d DCA 1992).

Affirmed.

SCHOONOVER, C.J., and LEHAN and FRANK, JJ., concur.